



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. IV

In the matter of

Appeal No. 91 of 2016

National Testing Service - Pakistan

...Appellant

Versus

Executive Director (CCD - Regulation)

Securities and Exchange Commission of Pakistan

...Respondent

Present:

For the Appellant:

- 1) Mr. Hanbal Kahlon, Counsel
- 2) Mr. Ahmed Hassan Shah, Counsel
- 3) Mr. Mudassar Rizvi, Counsel
- 4) Mr. Ahmer Shamsie, Senior Corporate Manager, National Testing Service

For the Respondent:

- 1) Mr. Muhammad Siddiqui, Executive Director (C&CD)
- 2) Mr. Mubasher Saeed, Director (C&CD)
- 3) Mr. Irfan Afzal, Joint Registrar (C&CD)

ORDER

1. This order is in the matter of Appeal No. 91 of 2016 filed under section 33 of the Securities and Exchange Commission of Pakistan (Commission) Act, 1997 (SECP Act) against the Order (Impugned Order) dated 15/06/16 passed by the Respondent.



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2. The brief facts of the case are that the Commission vide Order dated 24/02/16 (First Inspection Order) had appointed four of its officers (Inspection Team) to carry out the inspection of books of accounts and other books and papers of the National Testing Service-Pakistan (Appellant) in terms of section 231 of the Companies Ordinance, 1984 (Ordinance), inter alia, on the following grounds:
- Direct expenses of the Association have been increased by 91.30% from the year 2014-2015, which is inconsistent with the increase in total test revenue by only 47.5% over the same period.
 - The income from the test fee is increasing over the period which indicates that the association is charging fee on the higher side.
 - Significant increase i.e. 190% has been observed in the advances and accounts receivables from Rs.154 million (2014) to Rs.447 million (2015).
 - Huge amount of reserves are being created from the funds of the Association which prima facie, indicate that it is capitalizing its funds rather than using it for its objects, for which it has been established.
 - Huge amount of additional membership subscription amounting to Rs.598 million is appearing in the Fund which needs to be probed.
 - The audited accounts for the year 30/06/15 has revealed prior year adjustment of Rs.46 million which needs to be probed.
 - The Appellant through letter dated 17/09/15 provided the minutes of the meetings of the board of directors as annexure, analysis of which revealed that only one meeting of directors was held on 07/10/13 during the year under review in violation of section 193(2) of the Ordinance.
3. Pursuant to section 231 of the Ordinance, the Inspection team carried out inspection of books of accounts and other books and papers of the Appellant and submitted its inspection report dated 03/05/16 in terms of section 231(5) of the Ordinance. The summary of such findings of the Inspection Team are given hereunder:



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- a) Substantial amount of Rs.78 million was paid to various consultants in the name of consultancy charges, the actual purpose of which appears to be otherwise and requires deeper probe through investigation.
- b) The testing fee charged from the candidates appears to be on higher side as these fees are shared/paid to the respective clients in the name of consultancy charges. No costing mechanism has been employed by the Appellant to determine the estimated cost attributable to each testing project.
- c) The Appellant has extended huge amount of interest free loan/advances to its associated undertaking COMSATS Institute of Information Technology (CIIT) out of the reserves piled up through charging higher fee from the candidates, which is in violation of provision of section 208 of the Ordinance and the condition of the license issued to the Appellant.
- d) Various MoUs signed by the Appellant with its associated universities for awarding need-based scholarship, appears to have been prepared in haste as most of them were undated and/or not signed by the Appellant's representatives.
- e) The net assets of the NTS-Project transferred to the Appellant in 2013 included a plot bearing No. 96 measuring 0.88 acres (4259 sq. yards) situated at sector H-8/1 Islamabad, which was allotted by Capital Development Authority (CDA) to the CIIT. The Appellant, however, has not produced any evidence of ownership of the plot as claimed by it by virtue of such transfer of NTS-Project, which indicates that the said plot is still the property of CIIT.
- f) The Board of Governors (BoG) of the CIIT was, prima facie, deliberately kept unaware by the Management Committee of the NTS-Project about the incorporation of the Appellant in the year 2003. This also suggests that the application for grant of license under section 42 of the Ordinance by the CIIT to the Commission in the year 2003, was without the consent and approval of BoG of the CIIT.



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- g) The Appellant has failed to carry out any fair valuation of the assets and liabilities at the time of transfer of NTS-Project to the Appellant in March 2013. The fair value of these assets and liabilities are required to be determined to ascertain the actual net worth of the Appellant.
- h) Since the CIIT is controlled by Ministry of Science and Technology (MoST), the clarification from the line ministry is required to be sought to ascertain as to whether the BoG of the CIIT having interested directors of the Appellant exercise voting on their own recommendation, had the necessary mandate to accord approval to transfer the NTS-Project to the Appellant.
- i) The assertion of the Appellant that it is a separate and distinct entity from the COMSATS is not a tenable in view of various underlying facts which suggest that both the entities are under common management and control and, therefore, are associated undertaking of each other.
- j) The Appellant has failed to comply with the provisions of the Public Sector Companies (PSC) Rules and the Public Procurement Regulatory Authority (PPRA) Rules during the period under review.
- k) Since the Board of Directors does not have appropriate mix of the people from diverse segments of the society, the Appellant lacks transparency in the management of its affairs.
- l) The Appellant had constituted the BoG and conferred upon them substantial powers and mandate which are usually exercised by the board of directors or the members. Moreover, substantial expenditure was made on boarding and lodging of the members of the BoG who came to participate in the BoG's meetings. This act is not only violation of provision of section 196 but also suggests the wastage of resources of the Appellant which should otherwise have been utilized for furtherance of the object of the Appellant.
- m) In terms of provision of section 263(c) of the Ordinance, the Commission may appoint one or more competent persons as inspectors to investigate the affairs



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of any company and to report thereon in such manner as the Commission may direct on receipt of a report under section 231(5) of the Ordinance.

4. The Respondent in view of the foregoing findings and recommendations of the Inspection team appointed Mr. Shahzad Qazi, FCA of M/s. Horwath Hussain Chaudhry & Co. Chartered Accountants in exercise of the power conferred under section 263 of the Ordinance. The Inspector was directed to carry out investigation into the affairs of the Appellant as per terms of reference (TORs). The Inspector was further directed to analyse the TORs, give his findings after meeting all the requirements of the law, which should be supported with material evidences relied upon by him. He is further directed that each and every reported violation should not be vague and bear reference to relevant provisions of law. The Inspector's attention is also invited to the provisions of section 266 of the Ordinance, which conferred upon him the same powers as are vested in a court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters:

- a) Enforcing the attendance of persons and examine them on oath or affirmation;
- b) Compelling the discovery and production of books and papers and any material objects; and
- c) Issuing commissions for the examination of witnesses;

and every proceeding before such person shall be deemed to be 'judicial proceeding' within the meaning of sections 193 and 228 of the Pakistan Penal Code, 1860.

5. The Appellant preferred the instant appeal and a preliminary hearing was held to ascertain whether an Order under section 263 of the Ordinance is an administrative order and is appealable before the Appellate Bench under section 33 of the SECP Act. The Appellant's Counsel's argued that the appeal was maintainable on the following grounds:

- a) Director (CCD) does not possess delegated authority under section 231 vis-à-vis the Appellant. Director (CCD) in paragraph 4 of the First Inspection Order,



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unequivocally maintains that he exercised authority under section 231 of the Ordinance delegated by the Commission vide SRO 154(I)/2015 dated 19/02/15 (SRO 154). However, a review of SRO 154 shows that Director (CCD) does not possess any authority to issue an order or take any steps vis-à-vis section 231 of the Ordinance against the Appellant. SRO 154 provides for delegation of powers and functions by the Commission to various officers namely: (a) Commissioner (Company Law Division); (b) Head of Departments and other Officers (c) Head of Department (Corporate Supervision Department); and (d) Director (Corporate Supervision Department). Delegation of authority under category (d) above does contain delegation of powers to Director (CCD) vis-à-vis section 231, however, such delegation is strictly in respect of (i) listed companies (except insurance companies and NBFCs) and (ii) private limited companies having share capital and other unlisted public companies. A plain reading of the above makes it clear that the delegation of authority above does not extend to matters relating to companies not having share capital. The Appellant is a section 42 company having no share capital; therefore, the above delegation is of no avail, and the Respondent as Director (CCD) could not have exercised due power or authority to initiate any inquiry or inspection under section 231. SRO 154 was subsequently amended vide SRO 1003(I)/2015 dated 15/10/15 (SRO 1003), however, SRO 1003 also does not confer upon the Director (CCD) to exercise any powers under or in respect of section 231. Therefore, the exercise of authority by Director (CCD) in the matter is without jurisdiction and the First Inspection Order is liable to be set aside and so is the superstructure built thereon. It is clear that the power under section 231 of the Ordinance remains vested with the Commission and no officer of the Commission unless delegated authority is accordance with the law may exercise any power thereunder. Section 30 of the SECP Act (before the SECP Amendment Act, 2016) may clarify the matter further, which provided that an investigation or inspection by an investigating officer may be carried out only after a written order of the Commission signed by two Commissioners. Following the SECP Amendment Act 2016, section 30 has been



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amended to provide that such power is subject to a written order by a Commissioner or an officer authorized in this behalf. It is, therefore, manifest that there existed no authority with the Director (CCD) or the Executive Director (CCD) at the relevant time to undertake or authorize the conduct of any inspection or investigation, including an outside investigator. Any inspection, therefore, undertaken by the officers of the Commission as relating to the Appellant is unauthorized, without jurisdiction and in utter disregard of the express provisions of the SECP Act, the Ordinance and SRO 154. Reliance is placed on *Yousaf Ali vs Muhammad Aslam Zia and 2 others* cited at *PLD 1958 SC 104 at page 116* where the Honourable Supreme Court, while discussing the validity of an order observed that it is assumed that an order passed is under due authority, and if it is not, such order is void and non-existing. Powers under section 263 of the Ordinance are not delegated to any Commissioner. To the extent there is delegation of powers vis-à-vis sections 263 and 265 to the Head of Department and other officers of the Commission, they do not include companies such as the Appellant, that is, companies having no share capital. Therefore, the Impugned Order is liable to be set aside on this ground alone.

- b) No opportunity of hearing was granted to the Appellant before passing the Impugned Order. Even if the First Inspection Order was assumed to have been passed in accordance with the law, the Impugned Order is still liable to be set aside on the ground that the Appellant was neither given a show cause notice nor granted an opportunity of hearing before the Impugned Order was passed. The principle of audi alteram partem is enshrined in every law and has been consistently adhered to the Commission as well. In fact, this principle is incorporated in section 22(3) of the SECP Act, 1997 which requires that the Commission, or every officer authorized to act in its stead, before giving the reasons for its decision shall also afford a personal hearing to the person concerned while exercising any power or function in addition to any written submission. However, no opportunity was granted to the Appellant (i) at the time of passing of the First Inspection Order, as well as (ii) at the time of



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passing of the Impugned Order. Reliance is placed on the case of *General Tyre and Rubber Company of Pakistan Limited vs Bibojee Services (Private) Limited* cited at 2002 CLD 1366 at page 1375, wherein, it was held that, “.....giving a fuller opportunity could have given a better picture of the affair before passing an order under section 263 of the Ordinance...” It is submitted that the Appeal must succeed as the Impugned Order is premised on an order and a report that are without authority.

6. The Appellant further argued on merits as follows:

- a) The Superior Courts have interpreted that investigation into affairs of a company means investigation of all its business affairs - profits and losses, assets including goodwill, contracts and transactions, investments and other property interests and control of subsidiary companies too. Therefore, it is clear that investigation by an Inspector under the provisions of Ordinances does not entail investigations for purely legal issues, which can only be investigated and determined by a court of law. In this regard, attention is invited towards TORs 1 to 9 framed under the Impugned Order for investigation of the Appellant. Furthermore, the investigation under TORs No. 2 to 9 is beyond the jurisdiction of the Commission. The said terms of reference suggest the investigation of COMSATS Institute of Information Technology (CIIT) rather than the investigation of the Appellant. The Commission does not possess any powers and/or jurisdiction to investigate the affairs of such body corporate which does not fall within the domain of the Ordinance. In this regard, it is relevant to mention here that CIIT does not fall under the domain of the Ordinance as it is not a body corporate for the purposes of the Ordinance. TOR No.12 suggests that the fees charged by the Appellant from the candidates is on the higher side in relation to the actual expenditure incurred on related test conducted. The provisions of the Ordinance do not empower the Commission or the Inspector appointed by the Commission to determine the reasonability of the fee charged by the Appellant regarding different testing services. The Commission cannot shift its



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duties on the Inspector regarding the implementation of the laws against the Appellant. In this regard attention is invited towards TORs No.17, 18 and 19. The TORs are framed in a hasty manner without exercise of judicial mind. The Impugned Order, therefore, is liable to be set aside.

7. The Respondent rebutted the arguments of the Appellant on preliminary grounds as follows:

- a) Proviso to section 33 of the SECP Act states no appeal shall lie against an administrative decision/direction given by the Commission or an officer of the Commission. Reliance is placed on the letter of the Assistant Registrar Appellate dated 17/11/15 with reference no. 29(6)def/ABR/15 in the appeal titled *Al-Qurash (Pvt.) Ltd vs. Executive Director (C&CD)*, wherein, it was stated that appeal cannot lie against the administrative direction of the Commission. Furthermore, no appeal shall lie against an order which does not dispose of the entire case as stipulated under section 33(1)(d) of SECP Act, therefore, mere issuance of order under section 263(c) for investigation into the affairs of the Company cannot be construed as disposing of the entire case. Reliance is placed on the case cited as *PLD 2010 Supreme Court 946* titled as *M/s Attock Refinery Limited vs. Executive Director Enforcement*, wherein, it was held that, “*the mere appointment of an investigator does not “dispose of the entire case.”* The learned Appellate Bench has previously relied upon the aforesaid judgment of the Honourable Supreme Court while dismissing Appeal No. 13 of 2013 vide its Order dated 18/06/13 in the matter of *M/s Climax Engineering Company Limited vs. Head of Department (Enforcement)*, wherein, it was held that, “*...appeal against the order of investigation being an interim order under section 33(1)(d) of the Act does not lie before the Appellate Bench. The appeal is dismissed with no further order as to cost.*”

There is no requirement of sharing report received under section 231 or providing Opportunity of Hearing to the Appellant nor is it a mandatory requirement under statute. Reliance is placed on *Khaqan Industries Ltd vs. Islamic Republic of Pakistan*

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cited at 1979 SCMR 62, wherein, it was held that, “...there was, therefore, no question of issuing further notice to the Petitioner-Company, or giving it further opportunity of being heard. It is also clear that the Petitioner Company will have proper opportunity of defending itself before the inquiry officer if and when he enters upon its functions.”

- b) As per clause 6.1 of the SECP Investigation Manual, the hearing opportunity is mandatory only in the following cases:
- (i) Section 265(b) of the Companies Ordinance, 1984
 - (ii) Section 27(3) Central Depository Act, 1997; or
 - (iii) Section 21 of the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002.

The Respondent, therefore, was not required under the law to issue prior notice. The contention of the Appellant regarding issuance of order under section 231 of the Ordinance dated 24/02/16 is only an afterthought, as the said order was never challenged before any forum nor the same was challenged in the instant appeal. The Appellant, therefore, cannot agitate the matter which is beyond the scope of the appeal under review. Reliance is placed in the matter of “*Combined Investment (Private) Limited vs. Wali Brothers and others* cited as *PLD 2016 Supreme Court 730*, wherein, it was held by the Honourable Chief Justice of Pakistan that the principle of estoppel comes into force after they had accepted certain facts of the case and that none of the parties to a judicial proceeding could be allowed to adduce evidence in support of contention not taken earlier in pleadings. Furthermore, in the SECP Inspection Manual duly approved by the Commission, the sharing of inspection report is also up to the discretion of the competent authority.

8. The Respondent rebutted the arguments of the Appellant on merits as follows:

- a) TORs of the Impugned Order have been prepared in light of the findings of the Inspection report, which fall under the purview of the Commission. The scope of the



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TORs appears to have been misconceived by the Appellant. The Commission granted license to the Appellant for promoting education etc. Therefore, it is imperative for the Commission to ensure that the Appellant is pursuing its core objects as permitted in the license. The TOR No.12 regarding charging higher fee also supports the apprehension, which has been inserted in light of the findings under para 4.2.4 of the inspection report dated 03/05/16 which provides, "*The empirical analysis of the entire scheme, prima facie, indicates that the reserves piled up through charging higher fee from the candidates are substantially being utilized for payment to its associated undertaking COMSATS in the form of interest free loan/advances...*" The scope of investigation under TORs 1 to 9 are all factual issues which fall under the purview of the Commission. The provision of section 268(1) of the Ordinance, stipulates that, "*it shall be the duty of all officers and other employees and agents of the company and all persons who have dealings with the company to give to the inspector and all assistance in connection with the investigation which they are reasonably able to give.*" The Commission has granted the license to the company under section 42 of the Ordinance for promoting education by establishing educational testing and training service center. In light of such a noble cause for which the Appellant has been granted license, it is imperative to ascertain as to whether such objective has been compromised while setting the fee structure for conducting tests. Moreover, investigation is only a fact finding exercise through the inspector appointed by the Commission.

9. We have heard the parties i.e. the Appellant and the Respondent. Section 263(c) of the Ordinance provides that the Commission may appoint one or more competent persons as inspectors to investigate the affairs, "*in the case of any company, on receipt of a report under section 231(5) or on a report by the registrar under section 261(6) of the Ordinance.*" In the instant case, without going into the merits of the appeal we have to first see whether the appeal is admissible before the Appellate Bench. In the instant case, investigation was ordered under section 263 of the Ordinance after First



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Inspection Report was submitted under section 231(5) of the Ordinance. The Appellant has argued that the First Inspection Report issued under section 231 of the Ordinance cannot be a basis for the investigation as the delegation of authority to Director (CCD) does not extend to matters relating to companies not having share capital and the Appellant is a section 42 company having no share capital. The Respondent has argued that this matter was not agitated before and the Impugned Order is an administrative direction against which no appeal lies and no hearing opportunity was required to be given to the Appellant. We are of the view that the appeal is admissible on the grounds that the issue at hand is prima facie ambiguity of delegation of powers and that no hearing opportunity was provided to the Appellant. Reliance is placed in the matter of *Messrs General Tyre and Rubber Company of Pakistan Limited and 2 others versus Bibojee Services (Pvt.) Limited*, cited at 2002 CLD 1366 wherein, it was held that, “we are of the opinion that the main issue for us to determine is, as to whether there was a “good reason” or “good cause” for the Executive Director to appoint an Inspector and investigate into the affairs of the appellant company GTR. Further, whether such reasons were concluded after giving an opportunity of hearing to all concerned parties...”

10. In view of the above, the Impugned Order is set aside and the matter is remanded to the Respondent to revisit the matter after giving an opportunity of hearing to the Appellant, under the authority of expressed delegated powers.

(Fida Hussain Samoo)
Commissioner (Insurance)

(Zafar Abdullah)
Commissioner (SCD)

Announced on: 26 DEC 2016